# THE FUTURE OF THE COMMON LAW.

The original constitution of government and the common law of the states composing the United States of America were the product of the inherited and ancient law of English-speaking peoples. It was a common-law and English-speaking people who organized, developed and made possible this nation. Its subsequent political thought and its influential habit and traditions have been their thought and their habit and traditions. Until recently all subsequent accessions to the body politic, so formed and so developed, have been brought into harmony and adjustment with the perhaps unconscious, but none the less powerful, national tendencies and the prevailing national thought and temper. Thus far the nation has had a happy development projected on the original lines. The new-comers have either acquiesced in the national tendencies, or have yielded to the subtle play of dominant political and national forces.

The Roman or civil law, in force in the Latin parts of America, such as Florida prior to the Peace of Paris, and Louisiana and the other territories embraced in the Louisiana purchase of 1803, or in the countries ceded by Mexico, pursuant to the Treaty of Guadalupe-Hidalgo of 1848, was without influence on the Federal Constitution or the common law fully established in the old United States at the time of the definitive treaty of peace with Great Britain in 1783. The subsequent colonization or settlement of the national domain, called the Northwest Territory, only extended the influence of the common law and the old people of the thirteen original states. It was their sons and daughters who went "West." Soon after the Louisiana purchase and the Mexican cessions, there was again a rapid influx of English-speaking peoples from the older states of the Union. Their solidarity and their political and moral influences speedily subjected the newly acquired country to the original common law of the older states of the Union, except in a few inconsequential particulars of limited operation.

At the end of the great Civil War of 1861-1865, which served to consolidate the nation and to give it a political stability before lacking, the people of the entire Union were distinctly a common law and an English-speaking people. Their family relations, their pursuits and their elemental rights were determined by the defini-

tions and the rules of the old common law of all English-speaking communities. It was then impossible to think of such relations or rights, even abstractly, without some reference to the prior history and the common law of the dominant and original people of the United States. At school, college or the university, in the field or the shop, the institutions and habits were inspired by the traditions and rules of the common law. Statesmen and all men of political influence, the men of the various professions and finally those in every department of life, thought and acted, unconsciously perhaps, in the terms of and according to the fundamentals of the old common law of English-speaking peoples. It is not too proud a boast to affirm, that it was these common law institutions and their logical outcome which had then finally made the Union one of the greatest political and moral forces of the modern world.

The common law of a people is the law best adapted to that people. It is founded on common consent, and it tacitly expresses the long development and the slow and measured growth of the legal institutions of the people bound by it. It is conceded by all scientific historians, that the old common law of America contains certain subtle principles which best make for freedom and political morality. The civil law, which alone disputes with the common law the legal hegemony of the civilized world, coalesces less easily with free governments. It is less scrupulous about freedom and free institutions. The genesis of political freedom is very remote. It was, I think, Tacitus who first observed that awakening or elementary freedom which ultimately manifested itself so strongly and in better terms in the common law of that dominant race, destined long afterwards to rule beyond the seas. In his treatise, *De moribus ac populis Germaniae*,[1] Tacitus says,

*"Reges ex nobilitate, duces ex virtute sumunt. Nec regibus infinita aut libera potestas, et duces exemplo potius quam imperio, si prompti, si conspicui, si ante aciem agant, admiratione praesunt."*

The common law, as it will be remembered, took its rise among the primitive and already mixed people of old England as "folk-law" or peoples' law, its essentials being determined largely by custom, and not by the command of political superiors or by legislation. It was originally a rough, practical and spontaneous collection of Germanic and Norse customs, which scientific jurists only ultimately developed into a harmonious whole. Bracton, more than a thousand years after Tacitus, describes wonderfully well

[1]Chapter 7.

the common law of England about the year 1260. At the beginning of his Commentaries he says:[2]

*"Cum autem fere in omnibus regionibus urantur legibus et jure scripto, sola Anglia usa est in suis finibus jure non scripto et consuetudine. In ea quidem ex non scripto jus venit, quod usus comprobavit."* "Whereas in almost all countries they use laws and written right, England alone uses within her boundaries unwritten right and custom. In England, indeed, right is derived from what is unwritten, which usage has approved."

It was the first great commentator on the common law, Bracton, who first rejected the Roman definition of law: *"quod principi placuit legis habet vigorem."*[3] This early and formal rejection by an English jurist of rare distinction was a great step forward in the weary but sure march of the common law towards freedom.

Common law countries, unlike other countries, have had no "reception" of Roman law, except in certain peculiar jurisdictions. Consequently the common law owes very little to the civilians, compared with that which it owes to the rugged and, in the main, unscientific sources which have fed it. And yet in retrospect how beautiful, how harmonious, and how free from sophistry and abstractions the common law really is! What splendid texts of freedom are enshrined in its homely phrases! How well adapted it is to the great and free peoples who are bound by it! The common law may with due reverence be likened to the Bible in its splendid pronouncements of everlasting truths and its total want of scientific structure. That there are yet sociological and economic evils to be remedied in common law countries no one denies. But this fact lies outside of the content and the tendency of the common law itself. This much for the organic structure of the common law itself. Let us next glance for a moment at the duty and function of the common law judges, as contrasted with the judge known to countries subject to the civil law.

The common law never entertained the conception that a judge was a law-maker or "legislator." In respect of his contemplation of the law of the land, the common law judge is very differently situated from the legislator known to the common law. It is the latter who must keep ever in mind the changing needs and advantages of the people at large. How differently situated is the common law judge who is the servant and not the master of the law. The common law judge may only ascertain what the law is, and

[2]Folio 1, par. 2.
[3]Fol. 107.

then he must apply it fairly and impartially. He is not allowed to remodel it on some arbitrary and indeterminate theory of his own. The rights of the parties under the existing law alone concern the just common law judge. He cannot in giving judgment substitute his own conceptions for positive law. If he should attempt this, and ignore the stern unbending law of the land, he would soon be discredited. It has been a postulate of the common law, that no one man can ever legislate, or make new law. That single truth was the reason for its rejection of monarchy in principle, and its foundation of the collective, debating and governing bodies known as "parliament," "assemblies" and "legislatures." The subsequent struggle to arrive at the consensus of the majority in orderly ways gave rise to that greatest of political institutions, representative government. Under such a system chosen men meet together to debate and deliberate on means and measures. Such representative organs of the popular will, until comparatively recent times, were with one or two exceptions the product of common-law countries only. If persisted in, the legislatures of this country, purified and refined, will yet attain to a proud excellence, provided that in their new legislation they do not abandon the great essentials of the common law itself. Few laymen conceive how powerless to change the law the common-law judge is in fact. At every stage he is bound by the principles of justice and fair-dealing, deep in the heart of the common law. If he err, he is corrected by the common law itself. The one thing he may not do is to change of his own motion the law of his country, and this is well in a free land.

Under the common law, known to English-speaking peoples, this has long been a free and a happy land. But new forces are now arising and they are pressing on us changes, some of them radical and some of them I fear subversive in principle. These forces may, I think, be described as of two kinds: one of them is often said to be due to the tacit refusal of vast bodies of persons of foreign origin to subject themselves in reality to the national law and to the old institutions and temper of the country which they have so lately chosen for their own. This first force making for change contains little to be feared for reasons plainly seen in our national history.

At the time of the War of Independence nearly all the inhabitants of the North Atlantic Colonies were native born. They were, as Franklin said, in the main, the descendants of English-

men who had migrated to America in the seventeenth century. Few of the colonists had in 1776 ever been in the old country. This condition after Independence remained true of their descendants, who increased rapidly on the cheap lands and abundant food supply of the new world. By this hardy and homogeneous population, the common law was successfully applied to the new political conditions.

Since 1820 have come into the United States more than thirty millions of other men from all parts of Europe. The English-speaking accessions from the British Isles and Canada, and the Germanic and Scandinavian people from Northern Europe, have been readily assimilated. They and their descendants have become, or are rapidly becoming, imbued with the spirit of the land. These aliens have adopted freely the speech and the laws of the native inhabitants of the United States. The descendants of this class of settlers are very soon indistinguishable from the descendants of the original settlers of the land. Such accessions as those already noticed have been of the greatest value to the common country, and a large share of the wealth and progress of the United States since 1830 is due to them.

But it is often said and feared by many that the more recent accessions from lower and Eastern Europe will not be assimilated in like manner; that they will remain an alien population in language and habit, and that they will ultimately reject or change the old laws and institutions of the United States. That the newest-comers from Eastern and Southern Europe will take longer to assimilate and to become imbued with the national spirit, and familiar with the national laws, is not unlikely; but that their descendants will ultimately reject the laws and the customs of their new country is contrary to experience and our past history. Generation by generation these aliens too will soon fade away into the dominant and stronger mass of the already mixed population of this country. These last comers are not and can not be strong enough to alter, much less to subdue, the laws and the historic institutions of this great country. If change is to come in our laws and institutions, it will be due to far subtler causes than the peaceful and detached immigration of settlers from less favored lands. The life of individuals is very brief, but the life of the nation is perpetual, and in due course the nation will conquer all the alien elements which are suffered to enter it peacefully. It is not immigration which is the enemy at the gate of our old laws and institutions. It is a something in ourselves.

The change most to be feared in the ancient laws and institutions of this country will not come from the peaceful and weary aliens, toiling in their newly adopted land; but if it come at all, it will come from new political dogmas and new schools of juristic thought, openly taught in the great universities, and adopted and promoted by political aspirants who see only the temporary elements of popularity in public measures. There is no little reason to fear that the people of this country may, through such efforts, be induced to mar the inherited institutions and laws which have made the nation what it is. Lately a very distinguished foreign professor of law, in a leading Law Review of this country, has had the temerity to announce in substance that the original laws of this country, while very well adapted to the original settlements of this country by Englishmen, are unfitted for the "New Europe" which the United States had since become. This professor proceeded to advocate a new system of jurisprudence for this country. This system he calls "supernational law"—a law to be based on Roman law, and not distinctively based on the old common law. Such audacity on the part of a foreigner would merit little attention, were it not in line with the prior, deliberate and revolutionary teachings of some domestic professors of law in several influential institutions of learning in our own blessed country. Let us turn, for a moment, to these doctrines, first premising the characteristics of the common law itself.

The common law is and always has been both original and self-contained. Common lawyers not only have rejected the juristical speculations of most philosophical jurists of other nations, but they have a definite scientific scheme of their own. Common lawyers regard legal science as the science of positive laws. The continent of Europe furnishes a very different conception of legal science. A brief survey discloses the radical difference. The "reception" of the civil law in Europe produced a class of learned civilians who were at first content with exegesis of the civil law by methods both external and internal. No one questions the supreme value of the labors of this school. As long as the efforts of such jurists were so direct and practical, there was no difficulty in accepting the results of their labors. It was only when the continental jurists of Europe enlarged their horizon so as to regard jurisprudence as part of the phenomena of the universe, to be built up *a priori,* that common lawyers refused to follow them. Common lawyers deny, in short, that there is any

*lex legum.* France alone is an exception to the general statement that most of the continental jurists of Europe concern themselves too largely with the metaphysics of law. The French jurist Troplong observed this, and well said, *"il faut laisser des théories metaphysiques dont la jurisprudence n' a pas besoin."*[4] .This conclusion helps to demonstrate that French civilization also remains a very practical civilization, based on fact and experience.

To the common lawyer, the common law is not an end in itself, but a means of furthering the convenience of political societies subject to that law. To the German jurists, for example, law is an end in itself, and they go off on the origin of society and the purposes of law; they are intensely interested in the motives which first led men to regulate conduct by law. To them jurisprudence is one branch of philosophy or sociology. Their speculations and theories have to common lawyers an odor of the laboratory; they do not smell of the common law work-shop. German jurisprudence is preeminently a jurisprudence of conceptions; the jurisprudence of the common law is a jurisprudence of actualities. Common lawyers say, in substance, that there is no such thing as a "science of law" in the true meaning of "science." The Roman lawyer, like the common lawyer, never regarded law from a purely scientific point of view. The Romans did not speak of *juris scientia,* but of *juris notitia, juris peritia, juris prudentia.* As used by common lawyers a "science of law" refers merely to the result of an orderly research among a great mass of material.[5] When most common lawyers speak of a "science of law," they do not employ "science" in its true signification of a finding of some thing which is and exists before we discover it, but they use the term "science" in its secondary meaning, as denoting an organized body of known facts.[6] It has been well said, "that 'law' does not exist until men make it, nor does it exist as a subject outside of our consciousness." The deliberate opposition of common lawyers to the continental philosophies of law is founded on the opinion that "they are darkened by metaphysical thought and weakened by defective analysis of positive law."[7]

The common law never aimed at abstract definitions. It reserved itself for concrete applications. Prior to the last century

[4] *Des Testaments,* 23.

[5] 1 Chamberlain, Foundations of the Nineteenth Century, 137, 139.

[6] *Cf.* Amos, Science of Jurisprudence, 16; Oxford Dictionary, and Encyc. Brit. *sub voce* "Science."

[7] 15 Encyc. Brit. 579.

philosophical and metaphysical speculations on the origins and tendencies of law were almost unheard of among common lawyers. According to the common lawyers the common law was a fact, not a theory. The great modern Commentaries of Blackstone and Kent, the respective oracles of the common law of the two separated peoples most bound by it, are almost lacking in perspicuous and comprehensive definitions of law *in abstracto*. The first great commentator on the common law was quite content to refer his definition of *lex* and *jus* to the civilians.[8] But in this respect Bracton was without influence on the subsequent development of the jurisprudence of the common law. It was not until the appearance of the academic lawyer in this country, after the year 1870, that European ideas of the philosophy of law and the elements of jurisprudence became current among teachers of law and in university circles of this country. It is not strange that since then no really great book on the law of this country has appeared in America. The law cannot flourish *ab extra*. Since the teachers' hegira to Europe began, the best literary work of the professional or classical lawyer of this country has been in the main a somewhat attenuated, and not often profound, repetition of the thought of the philosophical jurists of continental Europe. This is easily accounted for by the constant procession of our professional scholars to foreign universities, other than French, after the year 1870. Had our scholars resorted to the universities of France, they would have acquired at least a certain "Gallic clarity" which is most valuable to the discussion of the abstract propositions of a general jurisprudence.

The study of the Roman law, or the study of the common law, produces certain definite results. To common lawyers the English and the Roman worlds are worlds of the will, and therefore of law and politics. Objectivity rules the conceptions of our lawyers, just as subjectivity rules that of modern continental jurists. To the common lawyers law is a fact; to most modern continental jurists law is an idea. To common lawyers only one aspect of law is essential, its formal aspect. To us Mansfield, Marshall, Erskine and Webster are the typical men of law. Yet probably no one of them was much acquainted with what the Germans call "Juristic Encyclopedias," or their concepts, except in so far as they have worked these out for themselves. Every great common lawyer has his own philosophy of law. Most pro-

[8]Bracton, fol. 2b.

fessional "jurists," as it is thought, are behind hand in common facts. The so-called "jurists," pure and simple, are not well trained to fight in the arena of common life. Few of them, for instance, could conduct a masterly cross-examination, which has done more to expose fraud and to defeat injustice than all the philosophies of the jurists. Most "jurists" hate law as an art, and love only its speculative side. The true man of law, the plain, practising, busy, useful lawyer, has little time for philosophical tangles; he is otherwise engaged as a champion in the actual battles of legal life, avenging the wronged and the injured, and defending the accused. These after all are the great problems of our common lawyers. The best mode to solve such problems is learned by actual practice. To actual lawyers law is an art, a high and difficult art, but not a "science." It can no more be learned from books than the fine art of painting can be learned from works on optics and the chemistry of colors. Set as a prelude to more concrete studies "juristic surveys" are highly useful. A "juristic survey" or encyclopedia is a unified exposition of legal science, or the science which professes to reduce jural phenomena to order and coherence. The dogmatics should not engross, as they do, almost the entire academic year in our law schools. Common lawyers have produced some profound analyses, or juristic surveys, which best answer the purpose of the students of the common law. To a stranger, however learned, there is apt to be something very illusive in a foreign system of law.

There is but one system of law, in practical efficiency worthy to be placed by the side of the common law, and that is Roman law. The common law, like Roman law, is isolated in origin and has a perfectly natural and harmonious development *ab intra* and not *ab extra*. If we regard all English-speaking peoples as practically one in legal tradition and development, the last statement remains true of the American common law, which, while it in some respects is *"jus receptum,"* rather than strict common law, nevertheless, is a national law by real tradition. In so far as "freedom" is a characteristic outcome of the common law itself, the American common law may be said to present the better development of the tradition. If left alone to develop itself, American common law will in future ages probably surpass all other expositions of freedom and social justice. The content is all here and only awaits a further perfecting. It needs no assistance from without. Indeed such assistance may be very prejudicial to the

future development of our national common law. The political institutions of any country are a reflex of its jurisprudence, and those of this country are in harmony with its law. I am not ashamed to prefer the law of my own land, with all its imperfections, to any foreign system or theory of law.

The preceding paragraph reluctantly adopted the phrase "social justice." These two words, "Social Justice," are now so much in the air, and they seem to express so much that is vague to those who lead in the political thought of the moment, that they demand, if for that reason only, some allusion in a paper on the common law. Social justice stands for a new legal and political philosophy. The serious side of this so-called "social justice" is that to some of our recent American professors of law it stands for a new organon or new legal instrument, by means of which they would subvert the common law of the land. The important question for us all is, whether such efforts should, in reason, prevail.

The history of law teaches us that legal philosophers find their congenial homes in schools of law. It is a well known fact that "law schools," or the formal schools for the teaching of the common law, have long flourished in the United States. In this particular this country unconsciously imitates Roman legal development, rather than that of common-law England. Doubtless in ages yet to come certain profound and influential legal philosophies will in this country be associated with particular schools of law. No thoughtful student of institutions can underrate the importance of particular schools of law on the future of the jurisprudence of this country. Nor should we deride the philosophies of such schools, for they are destined to play a large part in the national development. True "social justice" does not differ from the justice of the common law, but the postulates of the common law regard the new political philosophy, summed up under the name of "social justice," as to some extent social injustice.

It is a philosophy of law, then, which has furnished the most recent additions to the catch-words of the politicians. Few of the present catch-words of the politicians are entirely new. It was the Italian Mazzini and the Central European Democracy of 1849 who first employed the term "Progressives" and came out for the "Progress of Humanity."[9] The new sociological jurisprudence, called shortly "social justice," is only the latest cheap furnisher of the catch-words and mimic war-cries of the politi-

[9]Mazzini, *Scritti*, Vol. 8, 26.

cians. But I venture to affirm that it is not to sociological jurisprudence that this nation will owe its future greatness, but to the common law, that unfathomable, unending ocean of legal conceptions and political truths which make for freedom. Every one who opposes the new notions of the sociological jurisprudents is not steeped in obscurantism. What we want is an orderly progress to "social justice," on true and tried principles, consistent with the national law. If the ends and aims of the new philosophy of law are unsound, or not reconcilable with the history and ends of the old common law of this great country, it is surely a matter for concern when professors of law proclaim it in our schools of law.

The much sounded phrase "social justice" is part of the apparatus of the new legal philosophy, called "sociological jurisprudence." The main dogma advanced by this school is, that "legal science ought to be founded upon generalizations from a descriptive sociology." It is denied by its adherents, that sociological jurisprudence is concerned only with legislation, although it is most apparent that it ought to be classed as a philosophy of legislation. In modern Roman law the distinction between legislation and juristic application is often confused. The jurist Rudolph Stammler in his *"Die lehre von dem richtigen Rechte,"* published in 1902, is the chief exponent of the new jurisprudence, which, as it is claimed by its adherents, alone furnishes the foundation of the art of applying legal rules consistently with social justice. In other words it is Stammler who is the exponent of the new legal philosophy called "social justice." The laudable efforts of a foreign jurist of distinction to furnish to his countrymen the abstract principles of "social justice" is only mischievous when it is attempted to use it in order to subvert the principles of the ancient law of English-speaking peoples, and to seduce the officers of that law from their plain obedience to duty.

The statement, that the common law rejects the conception that a common law judge is a legislator, has already been advanced in these pages. Common law judges cannot apply the common law on any theory not contained in the common law itself, even if that theory is dubbed by the high-sounding name, "social justice." To common lawyers the common law is "social justice," or if not ideally so, in some few particulars, it rests with our legislators alone to change the ancient law, so that it shall better conform with equity and abstract justice. It has been well said

by a common lawyer,[10] "The common law is always subject to the controlling power of the statute law." This is a fundamental proposition or concept of the common law itself. We need have no fear that in time to come, as in time past, the legislature will not make the common law conform to the best ideals of social justice, without subverting the constitution and the entire common law of the land, as the modern professors of "social justice" would have our judges do if the new philosophy is allowed to prevail. We should remember that it is the old political philosophy, pervading the common law, which has made English-speaking peoples the real leaders of the world in the long fight for political freedom. In that old system the common law judge is never a legislator or an innovator. He can only apply the common law of the land as he received it from constituted authority. He is forbidden to enter into the new controversies of the schools. That privilege is reserved for the legislatures known to the common law.

What then is it that the common law alone expresses? The common law is the expression and result of the accumulated experience of English-speaking peoples. It is the sum of all the rights, customs, habits and liberties of the English-speaking people of this country, and, indeed, of the world. The history of law tells us, that when the Roman Empire went down to destruction, modern society was reconstructed out of the rich fragments of its noble law. The common law in turn expresses for us the traditional convictions of this nation. It is the sum of the countless rules which regulate the life of the American people. It regulates every civil act of the individual citizen from the cradle to the grave. So important is the common law that if all the statutes were swept away to-morrow, the nation could go on in an orderly manner, perhaps not so well, but well enough for the time being. On the other hand, if the common law were to disappear, the statutes would be meaningless, and public order must come to a stand. It is on the wonderful common law of this country that its whole future depends. I defy ambitious and unscrupulous men, high or low, ever to subvert the free government of this country until the common law shall be swept away, and this can not be. Fustel de Coulange, in his wonderful book, *"La Cité Antique,"*[11] well says on this point: "A transformation of law can

[10] 2 Notes, Cas. Ecc. Cts. 49.

[11] P. 366.

not be accomplished in a single stroke. If it is sometimes possible to change brusquely political institutions, laws and private rights can be changed only with slowness and by degrees. This the history of both Roman and Greek laws demonstrates." At least such is my understanding of his statement in French. If I remember aright Ortolan makes much the same statement.

It is our own common law which teaches us, that excessive or unequal taxation is tyranny, and that false economic legislation is in the end a deadly foe to Labor and to that uplift of the workingman which all good citizens now so earnestly desire. In a country where the suffrage is universal, the material and the moral uplift of the voters is an imperative necessity, for no state can long endure the strain of an uninstructed and impoverished political majority. No statesman of this country is either wise or great if he has not the fear and respect of the common law in his heart. Show me a demagogue and I shall see a foe of the common law. That there are new economic wrongs to be adjusted in this, as in every other land, no thinking man denies. But these wrongs are not the product of the common law but have come about through new agencies and in defiance of the common law.

There is now and again an unworthy imputation in high political quarters, that the lawyers of this country as a class are behind hand in that which makes, in the good sense of that abused term, for "social justice." Let us inquire who it is of common lawyers that is behind hand in his love of social justice? Most of them belong to the very soil of their native land and many of them to what is falsely termed the "poorer classes" of our country. Is it possible, that they are less in favor of the betterment and the uplifting of our own people and the class from which they spring, than is some mere politician, intoxicated by political power and maddened by the distorted phrases of a foreign sociology! The existing economic and sociological evils of this country have little to do with its common law. Such evils are due, in the main, to recent economic changes, now, as I believe, in course of natural and regular adjustment by peaceful and constitutional methods. Some of these economic evils might have been long since averted, had our political leaders been more timely and foresighted. More than twenty years ago when some political gentlemen, now clamoring about admitted economic evils, were certainly very supine in attempts to suppress them, the writer of these words ventured

to call public attention to one of such evils in an article published in the American Law Review for 1891.[12] While of no possible importance, it may be permitted to refer to the opening words of the paper in question, as they show the good faith of one ordinary common lawyer, at a time when such subjects were thought of little importance by the leading politicians of this country. The paper in question was entitled "The State and Private Corporations." It began as follows:—

"It is thought that the time is fast approaching when the States will be compelled to revise their policy towards the private corporations of this country. It will prove a large subject from either the economic or the political point of view, and it will be solved wisely only by candid and careful consideration of widely divergent views. The carrier and the farmer, the manufacturer and the consumer, the capitalistic classes and the artisans of all classes will be contending forces before the ultimate high tribunals which shall be charged by the States with the wise solution of so great a problem.

It would certainly be improper for us to pretend to any solution of so profound a question, yet with proper diffidence any one can well indicate how much is to be considered on both sides, and how difficult and perplexing the problem really is, for the proper appreciation of even this fact will serve at least to lighten the burden of those whom a State shall see fit to charge with the revision of its law of corporations. That such revision is not far distant, the signs of the time well indicate."

It was not until long subsequent to this warning, and when if ever noticed by anybody the words just quoted had been quite forgotten, that the politicians began an active propaganda against the corporations and the vested interests which they had erroneously permitted to grow to a maturity of mischief. The common law is not answerable for the countless and irresponsible corporations, so carelessly and thoughtlessly created by the legislatures in this country, during a period of rapid economic development of the unexploited resources of the country. The common law doubtless had a very imperfect conception of the law of corporations. But it had no hand in creating such corporations. In the later Roman law the law of juristic persons called corporations was much more philosophically worked out by the civilians. Corporation Law consequently remains a very proper field for the constructive labors of the legislatures of this country. There is but one logical course for states which create the artificial persons, called corporations, and that is to treat them as persons for

[12] Vol. 25, 581.

all purposes including the law of crimes. The modern theory, that corporations are to be regarded as a combination of individuals for some juridical purposes and not for others, is responsible for some of the prejudice against corporations. Doubtless in course of time the rights, obligations and duties of these juristic or artificial corporate persons will be completely settled by law, in scientific fashion and on a basis of economic and political justice. This settlement in order to be lasting, must be accomplished consistently with the vested rights, long and solemnly granted by the state, at a time when the whole people clamored for that rapid development of resources which can be accomplished only by co-operative effort. It would be a cruel wrong for the state to redress its own political impolicy at the expense of the innocent and the confiding investor. So to do would be contrary to that justice and fair dealing to all men prescribed by the common law of this country. We should always remember, when making new laws that there is no avenging Nemesis so relentless as that which punishes political injustice, or the abuse of the law-making power. Legislation must be moral and lofty in order to be enduring and beneficent.

As has so often happened in the long history of mankind, men have suddenly awakened to the conviction that something is wrong in the order of the world. What it is they do not clearly discern, so they fall in with abstractions and resort to generalities. They are easily deluded by phrases, and the old national reliance on actualities and experience has been temporarily abandoned. No nation in such a mood can reason successfully or solve accurately the problems which a new order of things involves. Meanwhile the apostles of discontent are having in this country their brief and joyful day—a mad day of sound and fury. Political demogogues, if I may apply so opprobrious a term to such simple and uninstructed leaders, are in a seventh Heaven of delirium, for their empty phrases fall readily on a listening ear. But there are already signs that their political night is at hand, when they must disappear in the abyss of shadows, from this fruitful and fortunate land.

If we are true to the common law of the land, the future of this country is as secure as its past. There are already signs that the best tradition of the common law of this country will ultimately find its most congenial home, not in Eastern cities, but in that great, fertile, prosperous and soon-to-be densely-peopled plain

which stretches between the two great ranges of mountains, dividing our native land. In that vast country where skies are even bluer and higher than on the seaboards, and where intellectual vistas are bound to be more extended and original, for the onrush of foreign seas cannot there be heard, will surely develop the conservative and permanent people of this great country. It is they who in due time will come to be the true men of the soil, and the very marrow and strength of the nation. It is suggestive that already every now and then come from that particular section profound treatises and papers on the common law, some of them superior in tone and thought. It is said, indeed, that the West now produces more general literature of merit than the East, and that the literary center of this country is now nearer Indianapolis than Boston. Whether this be true or not, it is on the people of the great plains of the country that the future greatness of the common law depends. Whatever we are as a nation we owe largely to the common law. Whatever prosperous development is in store for us must be wrought out on the original lines of the common law, and not on the lines projected by an alien socialistic philosophy. The agricultural classes of this country are by instinct conservative, and wise in the end. On them depends not only the permanence of the old common law but also the country's economic prosperity. Napoleon the Great, in his Letter to George III of England, dated the second of January, 1805, well said: "Finances founded on flourishing agriculture can never be destroyed." So the common law, deep in the lives of the rural communities, can never be destroyed. But it may be marred unless we have a care.

There is always in every country a certain political stability about its rural and agricultural population. It can be better depended on, in the last resort, to fight for the institutions and the common law of the country. There is in particular a certain innate dignity, a loftiness of political aspiration, and a sturdy independence about the free-holding American farmer which is manifested in their many distinguished sons bred to the common law. Few city or town-bred men can bring themselves to understand the true dignity of the old common law free-holding farmer of America. He never was the *métayer,* or peasant farmer, of the middle ages of Europe. Politicians are apt to mistake the simplicity of the agricultural and rural classes for lack of culture, and their sturdiness for stolidity, and our public men often pat-

ronize such humility, that humility which is the real basis of all good and fine character. There is a subtle nexus or bond between the common law of a country and its provincial or rural population. If this is accurate, there is no political battle so really worth fighting for by the lawyer and statesman as that of the farmers and rural people of this country. A democracy can endure only while it is conservative. When conservatism ceases absolutism invariably follows. History shows that unbridled democracies, when regardless of conservatism and their ancient law, proceed always to extremes. They first tax the rich in legal forms, then they openly despoil them, first under color of law by fines and confiscations, then regardless of forms of law. But history also shows that such measures never proceed from the rural classes more mindful of legal tradition. So it is here and so it will be.

The common law of this country came here originally not with the men from the old world towns, but with the men from the old rural communities, where there was a deep and instinctive love of the soil and the common law. Such men came for the advantages which the freer tenures and cheaper lands offered them. Man for man those early agriculturalists were vastly superior to the men from the towns. It was the agricultural man, the farmer of the old world, who, to use Blackstone's figurative description, "brought" the common law to these shores. If the American farmer and the common law will only continue hand in hand in this country, they can be depended on, without the assistance of the politicians of the towns and the new sociological jurisprudence, amply to work out the most profound problems of "Social Justice."

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